Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1998

QUARTZ CREEK LAND COMPANY,

*Petitioner,*

v.

COANTHA CHILDERS,

*Respondent.*

**On A Petition For A Writ Of Certiorari To The Gunnison County District Court, State Of Colorado**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Takings Clause of the United States Constitution, as incorporated by the Fourteenth Amendment, precludes a State from authorizing an individual from taking private property for private use in order to provide more direct and convenient access.

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## PETITION FOR WRIT OF CERTIORARI

Quartz Creek Land Company ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the May 10, 1995 opinion of the Gunnison County District Court, State of Colorado (the "trial court").

## OPINIONS BELOW

The opinion of the Gunnison County District Court, State of Colorado, was not reported (App. 1-5). The opinion of the Colorado Court of Appeals is reported at 946 P.2d 534 (Colo. App. 1997) (App. 6-12). The Colorado Supreme Court's Order denying certiorari as having been improvidently granted was not reported (App. 16).

## JURISDICTION

On May 10, 1995, the trial court issued an Order concluding that access to private property serves a public purpose and satisfies the requirements of the United States Constitution (App. 1-5). The Colorado Court of Appeals affirmed the trial court's order without deciding this constitutional issue (App. 6-12). On November 10, 1997, the Colorado Supreme Court granted Petitioner's Petition for Writ of Certiorari (App. 13-14). On June 25, 1998, after briefing and oral argument, the Colorado Supreme Court denied the Petition as having been improvidently granted (App. 16). On August 5, 1998, the Colorado Supreme Court denied Petitioner's Petition for

Rehearing; however, one Justice would have granted the Petition for Rehearing (App. 18).

On October 28, 1998, Justice Breyer denied Petitioner's Motion for Extension of Time to File a Petition for a Writ of Certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).[1]

Because the constitutionality of the Colorado Constitution itself is drawn into question, and because neither the State of Colorado nor any agency, officer, or employee thereof is a party to this action, 28 U.S.C. §2403(b) may apply. The notifications required by Rule 29.4(c) have been made.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. *Colorado Constitution Article II, §14*

"Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic, or sanitary purposes."

[1] Prior to 1988, a party had the right to appeal to this Court from a decision upholding the constitutionality of a state statute. Review is now by way of certiorari.

B. *Colorado Revised Statute §38-1-102(3)*

"Under the provisions of this section, private property may be taken for private use, for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes."

C. *United States Constitution, Amendment V*

"[N]or shall private property be taken for public use without just compensation."

D. *United States Constitution, Amendment XIV, §1*

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

## STATEMENT OF THE CASE

This case involves the constitutionality of Article II, Section 14 of the Colorado Constitution, and its enabling legislation, §38-1-102(3), Colo.Rev.Stat., which both authorize the taking of private property for private use, contrary to the Takings Clause of the Fifth Amendment. (App. 19-20).

Petitioner and Coantha Childers ("Respondent") are the current owners of adjoining parcels of rural land. On April 13, 1994, Respondent filed a "Petition in Condemnation" for a private way through Petitioner's land under the authority of Article II, Section 14 of the Colorado Constitution and §38-1-102(3), Colo.Rev.Stat. (1982). In

her Amended Petition, Respondent alleged that her property was landlocked, that she had no legal access to the county road system, and that the easement sought was "the most convenient and direct route to the public street system." Respondent indicated no other purpose for the proposed private condemnation.

On September 30, 1994, Petitioner filed a Motion to Dismiss in the trial court. The Motion requested dismissal because the Petition "fail[ed] to state that there is any public purpose for the condemnation sought" (Record Vol. I, pp. 12-18). On March 21, 1995, Petitioner filed a Supplemental Motion to Dismiss in the trial court specifically arguing that a private taking for private purposes is contrary to the public purpose requirement and would "violate the 14th Amendment to the United States Constitution. . . . " (Record Vol. I, pp. 48, 62).

On May 10, 1995, the trial court denied Petitioner's Motion to Dismiss and Supplemental Motion to Dismiss, rejecting, among other issues raised, Petitioner's constitutional challenges to the taking of private property for a private purpose (App. 2-3).

Prior to the "just compensation" trial, Respondent filed a Motion to Amend the Petition in Condemnation. The Motion to Amend indicated that it was ***not*** Respondent's intention that the easement be open to the public but only that it serve as a ***private*** driveway for Respondent. The amendment, entitled "Permanent Private Driveway Easement," provides that the easement is "for residential purposes only and will provide access to no more than four (4) residential sites." Thus, the true purpose of the taking was to enable Respondent to subdivide

and commercially develop her land into four residential sites and to use the road as "the most convenient and direct access.". Over Petitioner's objection, the trial court permitted the amendment.

Following the just compensation trial, the trial court issued its Amended Rule and Order authorizing the taking of this private way.

The Colorado Court of Appeals affirmed. *Childers v. Quartz Creek Land Co.*, 946 P.2d 534 (Colo. App. 1997) (App. 6-12). Despite the fact that Petitioner had briefed and argued the "public purpose" issue before the Colorado Court of Appeals (Opening Br. pp. 13-18), the panel failed to address it in the written decision. Petitioner also filed a Petition for Rehearing specifically advising the panel that "it failed to address the significant issue of whether granting [Respondent] a private way satisfies the 'public purpose' requirement of the United States Constitution" (Pet. For Rehearing pp. 1-3). The Court of Appeals modified certain portions of its decision but still failed to address the "public purpose" issue and denied the Petition for Rehearing.

The Colorado Supreme Court granted Petitioner's Petition for Writ of Certiorari (App. 13-14). The Colorado Supreme Court initially accepted the following issue:

> "Whether a private person's claim to take private property under §38-1-102(3), 16A C.R.S. (1982), and Article II, Section 14, of the Colorado Constitution, for access to landlocked property satisfies the 'public purpose' requirement of the United States Constitution." (App. 14).

After full briefing and oral argument, the Colorado Supreme Court inexplicably denied the Writ of Certiorari as having been improvidently granted (App. 16). The Colorado Supreme Court also denied Petitioner's subsequent Petition for Rehearing (Justice Kourlis would have granted the Petition) (App. 18).

Thus, the Colorado Appellate Courts have refused to decide in this case whether the Colorado Constitution is, itself, unconstitutional under the Takings Clause of the United States Constitution or, in other words, whether one person may take an easement across his neighbor's property because it is the most convenient and direct access and thereby allow the condemnor to subdivide and develop the land.

## REASONS FOR GRANTING THE PETITION

### A. THE QUESTION IS IMPORTANT

This case strikes at one of the core protections guaranteed to the citizens of the United States under the Federal Constitution – that their private property will not be taken except for a "public purpose." In contravention to the Takings Clause, the State of Colorado has authorized private persons to take private property for "private use" under certain circumstances. Colo. Const. Art. II, §14; §38-1-102(3), Colo.Rev.Stat. (1982) ("private property may be taken for private use. . . . "). The trial court decided an important question of federal law. It allowed the Respondent to take Petitioner's land for a private use

– the most convenient and direct access for subdivision and development into four residential sites.

"Private condemnation" is not a concept that is unique to Colorado. Indeed, many states have a constitutional provision that allows for "private condemnation." *See* Ariz. Const. art. II, §17; Ga. Const. art. 1, §III, Paragraph II; Mo. Const. art. 1, §28; Okla. Const. art. II §23; Or. Const. art. I §18; Wash Const. art. I, §16; Wyo. Const. art. I §32. A decision in this case will affect most of the country in that many jurisdictions have either a similar constitutional or statutory provision.

While previous Justices of this Court have held that the Federal Constitution does not prevent the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch in Utah, *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905), or of a right of way over the land of another for an aerial bucket line in Utah, *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), the Court observed that "[i]t remains for the future to disclose what cases, if any, of taking for uses which the state constitution, law, and court approve will be held to be forbidden by the Fourteenth Amendment to the Constitution of the United States." *Hairston v. Danville & Western Railway Co.*, 208 U.S. 598, 606, 28 S.Ct. 331, 52 L.Ed. 637 (1908).

In this case, the Respondent sought to take Petitioner's land because it was the "most convenient and direct" route to her land and so that she could subdivide and commercially develop her property into four residential sites. By allowing such a taking, Colorado has gone

too far. While farming and exploitation of natural resources were important public purposes as the country was developing in the early 1900's (*e.g., Clark v. Nash, supra and Strickley v. Highland Boy Gold Mining Co., supra*), today, the overriding "public purpose" should be preservation of this rural land and the conservation of its natural resources.

The importance of protecting private property rights from intrusions by the government as well as other persons is one of the most fundamental rights protected by the Constitution and lies at the core of the concept of "property." *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) (the right to exclude others is one of the most essential sticks in the bundle of rights that are characterized as property). This case presents the Court with the opportunity to answer the critical question left open in *Hairston, supra*, to wit, whether this type of taking, ostensibly authorized by the Colorado Constitution and enabling legislation, is forbidden by the Fourteenth Amendment.

## B. THE CONSTITUTIONAL CLAIM MUST BE DECIDED BY A FEDERAL COURT

Petitioner should have its federal constitutional claim decided by a federal court. Petitioner was the defendant in this case and did not select the state court forum. It had no legal basis to remove the case to a federal court despite its defense that the Colorado Constitution and enabling legislation were repugnant to the United States Constitution. *See, e.g., Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989);

*Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed 2d 318 (1987). Moreover, Petitioner is no longer entitled to review in this Court by way of a direct appeal. *See* 28 U.S.C. §1257(a). In the event this Court does not grant certiorari, the federal constitutional question will have escaped review by any federal court.

Even if Petitioner could initiate a §1983 case in federal court on the constitutional question, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), it appears that the Colorado state court's determination of the federal constitutional claim might collaterally estop Petitioner from actually litigating the issue. *E.g., Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 441, 66 L.Ed.2d 308 (1980). As such, it is imperative that this Court grant the Petition for Certiorari so that a federal court will decide whether the Colorado Constitution is repugnant to the United States Constitution.

## C. THE COLORADO CONSTITUTION VIOLATES THE TAKINGS CLAUSE BY ALLOWING CONDEMNATION OF PRIVATE PROPERTY FOR PRIVATE USE

The Takings Clause of the Fifth Amendment of the United States Constitution, which provides that private property shall not be taken for public use, without just compensation, U.S. Const. amend. V, is made applicable to the States through the Fourteenth Amendment. *Dollan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304, 315 (1994).

The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and only upon payment of "just compensation." *See Landgraf v. USI Film Products*, 511 U.S. 244, 266, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229, 253 (1994); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186, 197 (1984) ("one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.").

While the Fourteenth Amendment itself contains no independent "public use" requirement, that requirement is also made binding on the States by incorporation of the Fifth Amendment's Eminent Domain Clause through the Fourteenth Amendment's Due Process Clause. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244, n.7, 104 S.Ct. 2321, 2331, n.7, 81 L.Ed.2d 186, 200, n. 7 (1984).

A "public use" or "public purpose" is therefore required under the United States Constitution in private condemnation cases. *See, e.g., Bear Creek Development Corp. v. Dyer*, 790 P.2d 897 (Colo. App. 1990) ("We agree that under the due process clause of the United States Constitution a public use or purpose may be necessary for this [private] condemnation [brought under Article II, §14 and §38-1-101, C.R.S.]").

However, in one of the earliest decisions on the subject, the Colorado Supreme Court observed that the Colorado Constitution "is, in certain particulars, touching the right to take private property for private use, exceptional; and for certain enumerated uses ***changes*** the accepted

rule that the use to which private property may be condemned must be public." *Lamborn v. Bell*, 18 Colo. 346, 349, 32 P. 989, 990 (1893) (emphasis added). The Colorado Constitution, while perhaps "exceptional," cannot change the "public use" requirement imposed under *the United States Constitution*. U.S. Const. art. VI cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

There is little dispute that Colorado cannot constitutionally authorize the taking of private property for a strictly private purpose, even though compensation is paid. *Hawaii Housing Authority*, 467 U.S. at 245, 104 S.Ct. at 2331, 81 L.Ed.2d at 200 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

Respondent's taking for the "most direct and convenient" route so as to allow her to subdivide and commercially develop her land does not serve a "public purpose." It serves only the private purposes and economic gain of the Respondent.

In *Brown v. McAnally*, 97 Wash.2d 360, 644 P.2d 1153 (1982), the plaintiffs owned 28.9 acres of land which they desired to have platted into 44 residential lots. However, according to the plaintiffs, their property was landlocked. Therefore, the plaintiffs sought to condemn a private way of necessity to a public road under Washington's Constitution and enabling legislation. The trial court granted the petition, and the Washington Supreme Court

reversed, noting that the trial court had mistakenly assumed that the Washington Constitution and enabling statute authorize condemnation of a private way for commercial development purposes. *Brown*, 97 Wash.2d at 366, 644 P.2d at 1157. The Washington Supreme Court opined:

> "Our research has revealed no case in this jurisdiction which has extended the concept of 'private ways of necessity' for ingress and egress, to rights of way for the future development of real estate subdivisions.
>
> * * *
>
> "We have held, and continue to hold, that the statute which gives a landlocked owner a way of necessity over lands of a stranger is not favored in law and thus must be construed strictly. It must be borne in mind that [the enabling statute] authorizes a limited private condemnation proceeding in which the private property rights of one are taken for the benefit of another. The taking is limited to necessary ingress and egress and is not extended to those necessities that may be created by the contemplation of a future real estate subdivision development. ***There is, after all, a constitutional right to the protection of one's property that must not be lightly regarded or swept away merely to serve the convenience or advantage of a stranger to the property.***"

*Brown*, 97 Wash.2d at 370, 644 P.2d at 1159-1160 (emphasis added).

Unlike Washington, Colorado has trampled upon the constitutional rights of its property owners by allowing one person to take their neighbor's property because that

property provides the most convenient and direct way of access and to allow subdivision and development. Colorado has gone too far.

For the preceding reasons, Petitioner respectfully requests this Court to grant the within Petition for a Writ of Certiorari.

DATED this 3rd day of November, 1998.

Respectfully submitted,

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DISTRICT COURT, COUNTY OF GUNNISON,
STATE OF COLORADO

Case No. 94-CV-22

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ORDER RE: DEFENDANT'S MOTION TO DISMISS

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COANTHA CHILDERS, Plaintiff-Petitioner,

vs.

QUARTZ CREEK LAND COMPANY, a Colorado general partnership,

Defendant-Respondent.

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On November 16, 1994, a status conference was held by telephone with plaintiff's counsel and defendant's counsel at the time, Karl Ranous. At that time it was decided to set all matters requiring evidence at 10:00 A.M. on April 28, 1995, with the entire day reserved for the hearing and for viewing the land. At that time there was pending a motion to dismiss filed by the defendant. The minute order entered after that status conference neglected to state that all day was reserved and that all evidentiary matters would be considered on April 28, 1995.

After this conference, new counsel, Andrew Littman, took the place of Mr. Ranous. He filed a supplemental motion to dismiss.

On April 28, a hearing was held. The Court ruled that the supplemental motion to dismiss would be considered and not stricken. Mr. Littman stated he thought the hearing was only oral argument on the motions to dismiss and he was unprepared to proceed on the entire case. The

Court ruled that this was the hearing on the case and he needed to proceed. Mr. Littman indicated he had one witness, James Furey. Mr. Furey was located and did testify. Plaintiff testified as did Brian Hanson and Greg Gerkin. The Court toured the land with counsel.

Upon reflection, and reviewing the November 16, 1994 minute order, the Court has determined it should reconsider its decision of April 28 as to the nature of the hearing. Since the minute order stated it was only a hearing on the motion to dismiss, defendant's counsel had some reason to not be prepared on other issues – such as the necessity of the easement and whether plaintiff had engaged in good faith negotiations. Therefore, defense counsel is given ten days to notify the Court if he would like to present any additional evidence on issues other than those in the motions to dismiss. If there is no additional evidence, the Court will rule on all issues.

The Court denies the defendant's motions to dismiss for the following reasons. The original motion asserted four grounds:

1) The petition names the wrong party as defendant; 2) The petition fails to state a public purpose for the condemnation; 3) The petition fails to allege any necessity; and 4) The petition fails to describe the use to be made of the easement.

The amended petition names the correct defendant and thus this ground is eliminated. The purpose stated is to provide access from the county road system to a landlocked parcel. As held in *Bear Creek Development Corp. v. Dyer,* 290 P.2d 897 (Colo.App. 1990) access to property in

the state serves a public purpose and is a sufficient purpose under the statute and Constitution.

As to the third ground, plaintiff has alleged her land is land-locked, that she has no legal access to the county roads and has been unsuccessful in securing alternate access. This is a sufficient allegation.

As to the fourth ground, Plaintiff seeks "a permanent non-exclusive easement" and has attached a survey showing the easement sought. This is a sufficient description of the use intended.

In defendant's supplemental motion, a number of other grounds are alleged. The first one is that plaintiff knew there was no access when she bought the land and is thus barred from bringing this action. The evidence showed that the plaintiff knew there was no deeded access. However, she believed she had a right-of-way by adverse use or prescription. Indeed, after she acquired the land, she filed suit, unsuccessfully, to obtain an easement by adverse possession. It is thus not true that plaintiff knew there was no access when she bought the land. Even if she did know it, it is not clear that she should lose this suit.

Defendant quotes some *dicta* from *Coquina Oil Corp. v. Harry Kourlis Ranch,* 643 P.2d 519 (Colo. 1982) to bolster its case. However, *Coquina* involved an entirely different fact situation – a lessee suing for access. The *dicta* quoted does not even directly support defendant's position. If defendant's position is upheld, there would be very few private condemnation cases, since any purchaser is deemed to have notice of the public records which would

indicate whether there was deeded access to the land when it was purchased.

The second new ground in the supplemental motion is that plaintiff's claim is barred by the statute of limitations. For the reasons stated in plaintiff's brief, the Court does not believe the statute of limitations applies to this type of case. Even it if [sic] did, it appears that the statute would not start running until the adverse possession action was terminated. This happened in 1992 and thus would not be a bar to this action. The case cited by defendant, *Snell v. Ruppert,* 541 P.2d 1042 (Wyo. 1975) to support its position does not say what defendant claims and indeed supports the plaintiff's position. In *Snell,* a subdivision was made fifty years prior to the action being brought. The Court said that there was a statute of limitations problems [sic] for a common law way of necessity claim (not the condemnation claim). However, the condemnation action was allowed even though fifty years had passed since the subdivision had been made.

The third new ground in the supplemental motion is that the plaintiff must prove the use is for "agricultural, mining, milling, domestic, or sanitary purposes." Defendant argues that the Constitution (Article II, Section 16) mandates this and the statute implementing the Constitution, 38-1-102, C.R.S., is unconstitutional. This argument has been addressed and decided against defendant's position in *Crystal Park Co. v. Morton,* 146 P. 566 (Colo. 1915). This ruling was confirmed in *State Dept. of Highways v. Denver and Rio Grande Western Railroad Co.,* 789 P.2d 1088 (Colo. 1990) and *Coquina Oil, supra.*

The fourth new ground in the supplemental motion is that plaintiff lacks standing to bring this action. Plaintiff is the fee owner of a land-locked parcel and has standing. Defendant essentially repeats its arguments here that plaintiff has no deeded access and knew it and therefore can't sue. This was addressed previously in this decision.

In summary, the motion to dismiss and supplemental motion to dismiss are denied. The defendant has ten days to notify the Court if it wishes to present other evidence on the remaining issues.

Dated this 10th day of May, 1995.

By the Court:

/s/ David C. Johnston
David C. Johnston
District Judge

DCJ:elr

xc: Ostrander, Littman

Coantha CHILDERS, Plaintiff-Appellee,

v.

QUARTZ CREEK LAND COMPANY,
a Colorado general partnership,
Defendant-Appellant.

No. 96CA0075.

Colorado Court of Appeals,
Div. I.
Feb. 20, 1997.
As Modified on Denial of Rehearing
May 1, 1997.
Certiorari Granted Nov. 10, 1997.

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Stevens, Littman & Biddison, LLC, Craig A. Weinberg, Andrew C. Littman, Boulder, for Defendant-Appellant.

Opinion by Judge METZGER.

In this private condemnation action brought by plaintiff, Coantha Childers (Childers), seeking to provide access to certain landlocked real property located in Gunnison County, Colorado, defendant, Quartz Creek Land Company (Quartz Creek), appeals the judgment granting plaintiff's request. We affirm and remand the cause with directions.

In 1988, Childers purchased approximately 160 acres of land from her grandfather's estate. The property had been in the Childers family for several decades and was

adjacent to property owned by Quartz Creek. At the time of purchase, Childers was aware that the property was "landlocked" in that there was no readily available, deeded access to a public road, street, or highway.

In 1994, Childers filed a petition in condemnation for a private way of necessity under the authority of § 38-1-101, et seq., C.R.S. (1982 Repl.Vol. 16A) and Colo. Const. art. II, § 14, requesting a condemnation of a right-of-way over Quartz Creek's property to provide access to a county road. Quartz Creek moved to dismiss, and the trial court denied the motion, finding that Childers satisfied the requirements necessary for such a condemnation under § 38-1-101. Thereafter, a jury trial was held to determine the value of the condemned property rights. After the jury trial, Quartz Creek brought this appeal challenging, among other things, the constitutionality of § 38-1-102(3), C.R.S. (1982 Repl.Vol. 16A) as applied.

I.

Quartz Creek first contends that § 38-1-102(3) is unconstitutional as applied to the facts of this case.

Section 38-1-102(3) provides:

> Under the provisions of this section, private property may be taken for private use, for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes.

This statutory language is substantially similar to Colo. Const. art. II, § 14, which reads:

> Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

*See Coquina Oil Corp. v. Harry Kourlis Ranch*, 643 P.2d 519 (Colo.1982) (footnote 2).

Quartz Creek's chief contention is that the Colorado constitutional provision requires the consent of a burdened property owner except for private ways of necessity used exclusively for agricultural, mining, milling, domestic, or sanitary purposes. Quartz Creek contended at trial that Childers' plans to subdivide the landlocked property into four residential lots does not meet any of the underlying constitutional criteria and, therefore, the trial court erred in applying the legislative enactment of this constitutional provision in granting Childers the private way of necessity in dispute.

Specifically, Quartz Creek argues that the statute may be read to permit a private way of necessity for any purpose and is in direct contradiction to the Colorado Constitution which, according to Quartz Creek's interpretation, limits private ways of necessity to agricultural, mining, milling, domestic, or sanitary purposes only. We disagree.

The decision in *Crystal Park Co. v. Morton*, 27 Colo.App. 74, 146 P. 566 (1915) interpreted the constitutional provision and the relevant statutory provisions in effect at that time. The *Crystal Park* court engaged in a detailed analysis of the legislative history of the constitutional provision in order to determine whether a private

way of necessity could be granted for any purpose or whether such action could only be taken for the purposes enumerated in the constitution.

Relying on the natural import of the language used, the court found that the writers of the Colorado Constitution attached the limitation of necessity to the taking of private property for private roadways while at the same time refusing to limit the taking of private property for reservoirs, ditches, agricultural uses, etc. The court specifically stated: "We think that the Legislature, in enacting that section, [concerning private condemnation] did not have in contemplation a road used only in connection with the pursuit of agricultural, mining, milling, or. . . . " *Crystal Park Co. v. Morton, supra,* 27 Colo.App. at 86, 146 P. at 571.

Quartz Creek places great emphasis on the fact that the *Crystal Park* court reviewed constitutional language which did not contain a comma after the word "others" and that this anomaly significantly altered the court's analysis. However, a thorough reading of the *Crystal Park* decision shows that the court did more than a cursory grammatical review of the constitutional provision, and conducted an extensive analysis of the legislative and constitutional convention history.

Moreover, the *Crystal Park* court's interpretation of this constitutional language has been reaffirmed in *West v. Hinksmon,* 857 P.2d 483 (Colo.App.1992) (private way of necessity includes ways for reasonable and practical access to property otherwise isolated); *Bear Creek Development Corp. v. Dyer,* 790 P.2d 897 (Colo.App.1990) (private

way of necessity granted for access to parcel used for operation of telecommunications tower).

Consequently, we decline to reconsider the *Crystal Park* holding and affirm the trial court's application of § 38-1-102(3).

We note, however, that, pursuant to the decision in *Bear Creek Development Corp. v. The Genesee Foundation*, 919 P.2d 948 (Colo.App. 1996), the easement should reflect the potential for termination of the way of necessity if and when another access route is established to serve the property interests that exist at that time. Thus, we remand the cause for an appropriate amendment to the judgement.

II.

Quartz Creek next contends that Childers' claim for private condemnation was barred by the statute of limitations. We disagree.

Quartz Creek bases its argument on § 38-41-101(1), C.R.S. (1982 Repl.Vol. 16A), commonly known as the "adverse possession statute," which states:

> No person shall commence or maintain an action . . . to enforce or establish any right or interest of or to real property or make an entry thereon unless commenced within eighteen years after the right to bring such action or make such entry has first accrued. . . .

Essentially, Quartz Creek asserts that Childers, and her predecessors in interest, are barred from bringing the private condemnation claim because they have had

knowledge for more than 18 years that the property was "landlocked." We are not persuaded.

Generally, the limitation on actions set forth in the adverse possession statute may be "asserted either affirmatively or by way of defense and may be used in any action as a source of or as a means to establish title or the right of possession or as an aid or explanation of title." Section 38-41-113, C.R.S. (1982 Repl.Vol. 16A).

When §§ 38-41-101(1) and 38-41-113 are read together, it becomes clear that the time periods contemplated by the adverse possession statute may be used either negatively to defeat an adverse possession claim or positively to assert title to property which has been held for the applicable period. The adverse possession statute allows for the establishment of a property right but, once that right has been established, the statute does not limit the exercise of that right. Therefore, an individual who has held property adversely for more than 18 years may still bring an action to perfect title to that property after the statutory period has passed. Likewise, landowners have an existing claim of right to bring a condemnation action as long as they hold title to the benefitted property. *See Colorado Mountain Properties, Inc. v. Heineman*, 860 P.2d 1388 (Colo.App.1993) (declining to award damages based on delay in bringing condemnation action); *see also Wagner v. Fairlamb*, 151 Colo. 481, 379 P.2d 165 (1963) (concluding that a landowner's right to enforce a private way of necessity over property previously held under unity of title could not be extinguished by laches).

Finally, Quartz Creek's interpretation of the adverse possession statute would lead to the absurd result of

landlocking property in perpetuity if the initial owner of such parcel does not bring a condemnation action within the statutory period. Such a result is contrary to the public policy of the state.

III.

Finally, Quartz Creek contends the trial court erred in permitting Childers to amend the condemnation petition on the eve of trial. After a review of the record, we disagree.

The record clearly shows that Childers' amendment to the petition significantly improved Quartz Creek's rights under the easement over those encompassed in the original condemnation petition and that such changes did not adversely affect any valuation placed on the condemned property.

The judgement is affirmed and the cause remanded for amendment of the judgement consistent with the views expressed in this opinion.

NEY and CASEBOLT, JJ., concur.

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC414
CERTIORARI TO THE COLORADO COURT OF APPEALS, 96CA0075
DISTRICT COURT, GUNNISON COUNTY, 94CV22

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ORDER OF COURT
(Filed Nov. 10, 1997)

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QUARTZ CREEK LAND COMPANY, a Colorado general partnership,

Petitioner,

v.

COANTHA CHILDERS,

Respondent.

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Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issues set forth below, and the briefs shall be filed as follows:

(a) Petitioner's Opening Brief shall be filed within forty days from this date;

(b) Respondent's Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioner's Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

Pursuant to C.A.R. 54(a), the record on file will be treated as though sent up in response to a formal writ.

The issues as announced by the Court this day are as follows:

Whether § 38-1-102(3), 16A C.R.S. (1982), which authorizes the taking of private property for all "private way of necessity" is unconstitutional because Article II, Section 14, of the Colorado Constitution limits such takings for agricultural, mining, milling, domestic, or sanitary purposes.

Whether a private person's claim to take private property under § 38-1-102(3), 16A C.R.S. (1982), and Article II, Section 14, of the Colorado Constitution, for access to landlocked property satisfies the "public purpose" requirement of the United States Constitution.

DENIED AS TO ALL OTHER ISSUES.

BY THE COURT, EN BANC, NOVEMBER 10, 1997.

[SEAL]

cc:

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Honorable David C. Johnston
Gunnison County Courthouse
200 E. Virginia Avenue
Gunnison, CO 81230

Clerk of the District Court
Gunnison County Courthouse
200 E. Virginia Avenue
Gunnison, CO 81230

Patrick H. Stanford, Clerk
Colorado Court of Appeals

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC414
CERTIORARI TO THE COLORADO COURT
OF APPEALS, 96CA0075
DISTRICT COURT, GUNNISON COUNTY, 94CV22

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ORDER OF COURT
(Filed June 30, 1998)

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QUARTZ CREEK LAND COMPANY, a Colorado general partnership,

Petitioner,

v.

COANTHA CHILDERS,

Respondent.

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Upon consideration of the Record on Appeal, together with the Written and oral Arguments of Counsel, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Writ of Certiorari heretofore granted be, and is, DENIED as having been improvidently granted.

BY THE COURT, EN BANC, JUNE 25, 1998.

[SEAL]

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SUPREME COURT, STATE OF COLORADO
CASE NO. 97SC414
CERTIORARI TO THE COLORADO COURT
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ORDER OF COURT

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QUARTZ CREEK LAND COMPANY, a Colorado general partnership,

Petitioner,

v.

COANTHA CHILDERS,

Respondent.

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Upon consideration of the Petition for Rehearing of Order Denying Certiorari as having been Improvidently Granted filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Petition for Rehearing shall be, and the same hereby is, DENIED.

[SEAL]

BY THE COURT, EN BANC, AUGUST 5, 1998.
JUSTICE KOURLIS would grant the Petition.

cc:

Craig A. Weinberg
Andrew C. Littman
STEVENS, LITTMAN & BIDDISON, LLC
250 Arapahoe, #301
Boulder, CO 80302

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**§ 38-1-102. Petition – contents – parties**

(1) In all cases where the right to take private property for public or private use without the owner's consent or the right to construct or maintain any railroad, spur or side track, public road, toll road, ditch, bridge, ferry, telegraph, flume, or other public or private work or improvement which may damage property not actually taken is conferred by general laws or special charter upon any corporate or municipal authority, public body, officer or agent, person, commissioner, or corporation and the compensation to be paid for, in respect of property sought to be appropriated or damaged for the purposes mentioned, cannot be agreed upon by the parties interested; or, in case the owner of the property is incapable of consenting, or his name or residence is unknown, or he is a nonresident of the state, it is lawful for the party authorized to take or damage the property so required to apply to the judge of the district court where the property or any party thereof is situate by filing with the clerk a petition, setting forth, by reference, his authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested as owners or otherwise, as appearing of record, if known, or, if not known, stating that fact, and praying such judge to cause the compensation to be paid to the owner to be assessed. If the proceedings seek to affect the property of persons under guardianship, the guardians or conservators of persons having conservators shall be made parties defendant. Persons interested whose names are unknown may be made parties defendant by the description of the

unknown owners. In all such cases an affidavit shall be filed by or on behalf of the petitioner, setting forth that the names of such persons are unknown.

(2) In cases where the property is sought to be taken or damaged by the state for the purpose of establishing, operating, or maintaining any state house or charitable or other state institution or improvement, the petition shall be signed by the governor or such other person as he directs or as is provided by law.

(3) Under the provisions of this section, private property may be taken for private use, for private ways of necessity, and for reservoirs, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes.

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**Colorado Constitution § 14. Taking private property for private use**

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

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